

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. & affidavit
of mailing*

77-6121

To be argued by
J. CHRISTOPHER JENSEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6121

JOSEPH MARSHALL,

Plaintiff-Appellant,

—against—

UNITED STATES POSTAL SERVICE,

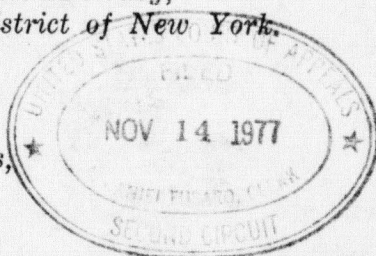
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Eastern District of New York.*

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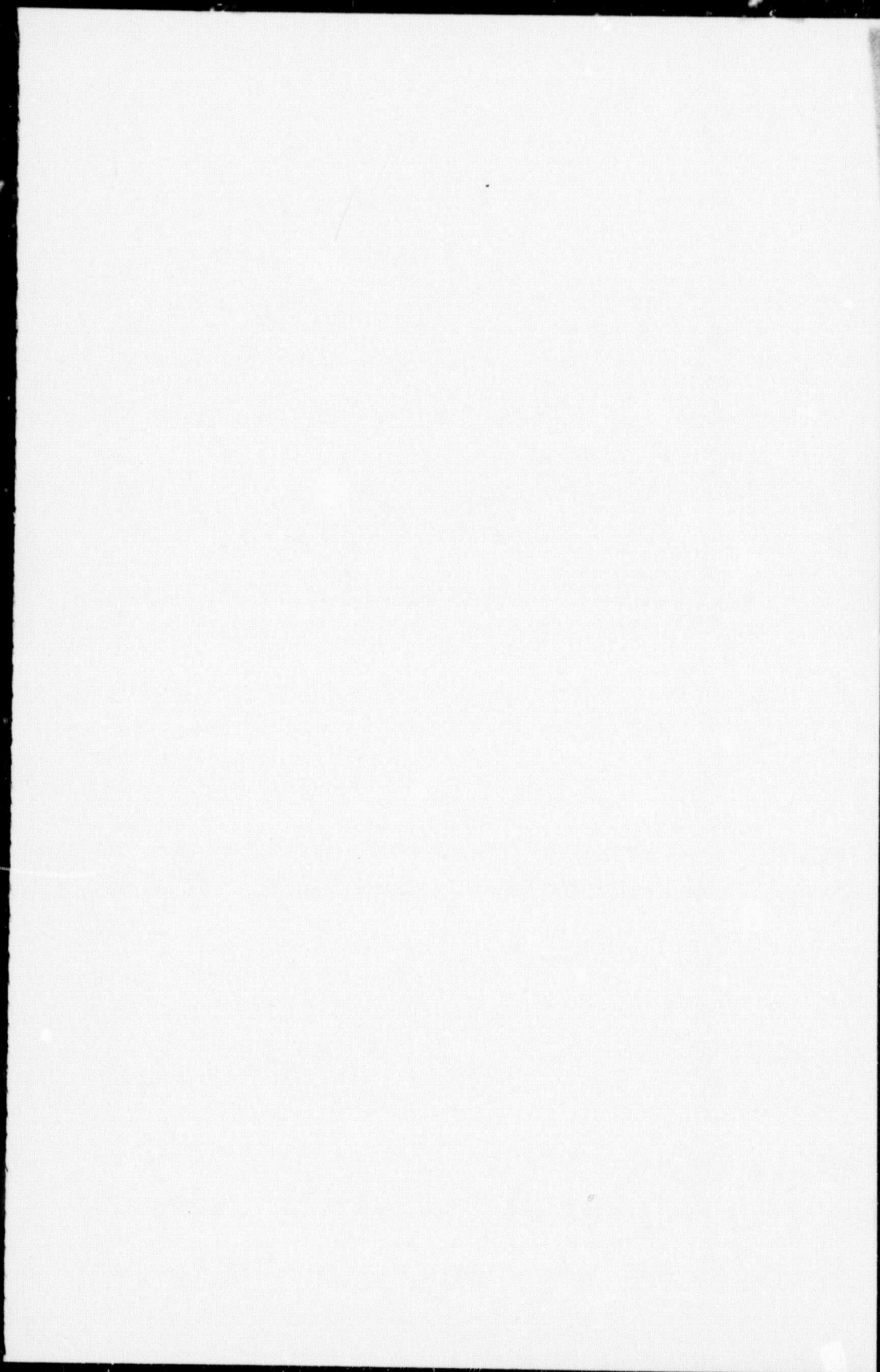


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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6121

JOSEPH MARSHALL,
Plaintiff-Appellant,
—against—

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Neaher, J.) dismissing appellant Joseph Marshall's complaint upon the merits. Judgment was entered by the Clerk on July 8, 1977, in accordance with the memorandum and order of the district court dated July 5, 1977 (2-11)¹ granting appellee's motion for summary judgment and dismissing appellant's cross-motion on the grounds that the determination of the United States Civil Service Commission ("Commission") that appellant's resignation from his employment was voluntary

¹ All references are to the Joint Appendix filed by counsel for appellant.

had a rational basis in the evidence, and was therefore not arbitrary and capricious.

Statement of the Case

Joseph Marshall had been employed by the Postal Service for eight years when he was arrested by postal inspectors on July 17, 1972, and charged with mail theft. Marshall's arrest was based upon information gained from the occupant of a house in which stolen welfare checks were found, who stated that the checks had been obtained from Marshall. On the advice of counsel, Marshall resigned from the Postal Service immediately after he was arraigned (27). The United States elected not to prosecute, and all charges were dismissed on January 4, 1974. Six days later, but 18 months after his resignation, Marshall requested reinstatement and back pay from the Postal Service. His request was denied by the Postal Service Commission and he appealed pursuant to 5 U.S.C. § 7701. After a hearing, an appeals officer of the Federal Employee Appeals Authority ("FEAA") dismissed the appeal based upon her finding that Marshall's resignation was voluntary and thus beyond the Commission's appellate jurisdiction (28-31). That decision was affirmed by the Commission's Appeals Review Board (32-33).

Marshall, who was represented by counsel throughout the administrative hearings, then commenced this action to review the Commission's determination.

The parties filed cross-motions for summary judgment on the certified transcript of the administrative proceedings and the district court entered its final memorandum and order on July 5, 1977. The district court concluded, as had the several administrative bodies before it, that Marshall's resignation from the Postal Service was informed and completely voluntary.

The Facts Relevant to the Issue Presented for Review

Joseph Marshall was arrested in the early afternoon of July 17, 1972 and taken to the New Lots Post Office in Brooklyn, New York, where Postal Inspector Louis P. Duquette verbally advised him of his rights (67). Marshall was then driven to Inspector Duquette's office in the Brooklyn General Post Office for interrogation. Duquette testified at the FEAA hearing that up to this time there was no discussion of a possible resignation or discharge (68), although Marshall contends that on the way to the General Post Office he was told by postal inspectors that it would be "better" for him to resign (40-41). Marshall signed a "warning and waiver" of his constitutional rights while in Duquette's office (34).

Inspector Duquette testified that he could not recall exactly what was said to Marshall regarding the effect of his arrest upon his employment because the hearing was approximately 19 months after Marshall's arrest (68). However, he did testify that employees who have been arrested on criminal charges were told that the postal inspector was required to send a letter describing the details of the arrest to the Postmaster who, in turn, would issue a letter of charges and offer the employee the option of resigning (68-69). The accuracy of this description of Postal Service procedure has not been questioned.

Marshall telephoned an attorney, Mr. Gary Fish, who met with him for 20 to 30 minutes prior to his arraignment before a federal judge in the United States Courthouse in Brooklyn (56). Fish then accompanied Marshall to the courtroom to represent him at the arraignment. Fish there consulted with Inspector Duquette, who allegedly told him that Marshall would benefit from resigning (57-58). After entering a plea of not guilty to

the charges of mail theft, Marshall consulted with Fish, who advised him to resign his position with the Postal Service (45). As Marshall testified at the hearing:

"It was described this way, that I would get off, I would come out better by resigning, and would be able to have my retirement pay and what have you; it would be easier on me if I resign, more or less. That it may drop the case completely if I resign and so forth." (29).

Marshall agreed to resign, writing and signing the following statement: "I, Joseph Marshall, No. 264-40-0996, do hereby resign my job at the U.S. Postal Service for personal reasons." (27).

Inspector Duquette testified that when an employee is arrested for mail theft he is typically separated from the Postal Service, either by discharge or resignation (78). With that fact in mind, Duquette advised Fish that Marshall might be better off in resigning, because if he did not, "even if he is not convicted, he will be fired" (58). Fish claimed that Duquette also stated that if Marshall chose not to resign, he would be fired and would "lose all his accrued benefits whatever they are" (58). Inspector Duquette acknowledged at the hearing that an employee loses "no rights whatsoever" by not resigning (76). He further testified that he had never told an employee or his representative that he would lose any rights by not resigning (76).

Approximately three weeks after his resignation, Marshall received a Postal Service POD Form 50, which contained the following statement: "resign voluntarily, personal reasons" (53). Marshall testified that at that point he unsuccessfully attempted to contact his union representative, but that he never actually contacted the union or the Postal Service about the official reasons listed for his termination (54).

The Federal Employee Appeals Authority, in its decision of August 23, 1974, found that the evidence of record failed to show that Marshall's resignation was obtained by duress, time pressure, intimidation or deception. Accordingly, the resignation was found to be voluntary (28). The Commission's Appeals Review Board affirmed this decision on February 27, 1975 (32).

I.

The Civil Service Commission's Decision To Dismiss Marshall's Appeal Was Not Arbitrary And Capricious.

A. Introduction

The Civil Service Commission has appellate jurisdiction pursuant to 5 U.S.C. § 7701 only over agency "adverse actions" as defined in the Commission's regulations. 5 C.F.R. 752.203. The removal of an employee by an agency is an adverse action from which the right of appeal lies, 5 C.F.R. 752.201(b)(1), but a resignation is not, because a resignation is a voluntary personnel action. *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975). The Commission will, however, treat an employee's resignation as a reviewable adverse action if it is "obtained by duress, time pressure, intimidation or deception." *Federal Personnel Manual Supplement*, 752-1, S1-2. The Commission will review an employee's allegation that he resigned under such circumstances, but the appeal must be dismissed as outside of the Commission's jurisdiction if it cannot be proven that the resignation was a product of the above four factors. *Dabney v. Freeman*, 358 F.2d 533 (D.C. Cir. 1965). The burden of proving that the resignation was involuntary is upon the employee. *Gratehouse v. United States*, 512 F.2d 1104, 1112 (Ct. Cl. 1975).

The Commission dismissed Marshall's appeal after a hearing, finding that his resignation from the Postal Service was voluntary. The voluntary nature of a resignation is an issue of fact, *McGucken v. United States*, 407 F.2d 1349 (Ct. Cl.), *cert. denied*, 396 U.S. 894 (1969), and a finding of fact by an administrative agency under these circumstances must not be disturbed unless it is found to be arbitrary and capricious. *McTiernan v. Grounouski*, 337 F.2d 31, 34 (2d Cir. 1964); *Wood v. U.S. Postal Department*, 472 F.2d 96, 99 (7th Cir.), *cert. denied*, 412 U.S. 939 (1973). Judge Neaher granted summary judgment in favor of the Postal Service, concluding that the findings of the hearing officer had a rational basis in the evidence and were therefore not arbitrary and capricious. The administrative record clearly supports this conclusion.

B. Marshall's Resignation Was Not Obtained Under Duress, Time Pressure, Intimidation or Deception.

1. Three elements are common to all situations where duress has been found to exist. They are:

- (1) That one side involuntarily accepted the terms of another;
- (2) That circumstances permitted no alternative; and
- (3) That said circumstances were the result of coercive acts of the opposite party.

Fruhauf Southwest Garment Co. v. United States, 111 F. Supp. 945, 951 (Ct. Cl. 1953); *Leone v. United States*, 204 Ct. Cl. 334 (1974); *Christie v. United States*, *supra*, 518 F.2d at 587.

The circumstances surrounding Marshall's resignation do not support his claim that his resignation was the product of duress. No "terms" were proposed to

Marshall, and no "deals" were offered him in return for his resignation. Unlike the situations in *Paroczay v. Hodges*, 297 F.2d 439 (D.C. Cir. 1961) and *Perlman v. United States*, 490 F.2d 928 (Ct. Cl. 1974), where the employee was promised that no charges would be pressed if he resigned immediately, Marshall had already been arrested and arraigned at the time of his resignation. The criminal charges against Marshall were not brought by the Postal Service as a means to force him to tender his resignation. There is no doubt that the Postal Service believed that the charges which would have led to Marshall's removal could have been substantiated, *Leone v. United States*, *supra*, 204 Ct. Cl. at 336, and, in fact, the evidence of Marshall's participation in criminal activity was sufficient for the Grand Jury to issue an indictment.²

Second, Marshall had a clear alternative to resignation—he could simply have elected not to resign and to fight his removal for cause. Inspector Duquette truthfully advised Marshall that a letter describing the circumstances of his arrest would be sent to the Postmaster, who would then discharge him from his employment according to Postal Service procedure. The FEAA hearing

² Obviously, this Court may take Marshall's indictment by the Grand Jury into account in assessing whether the Postal inspectors had a good and sufficient basis for advising Marshall that he was facing the prospect of removal from his position with all of the stigma attendant thereto. It has long been recognized that an indictment, regular on its face and returned by a legally constituted grand jury, is presumed to be founded on competent evidence. *United States v. James*, 290 F.2d 866 (5th Cir.), *cert. denied*, 368 U.S. 834 (1961); *United States v. Nunan*, 236 F.2d 576 (2d Cir. 1956), *cert. denied*, 353 U.S. 912. (1957). Even though the Government ultimately decided to dismiss its prosecution of Marshall, the fact that there was sufficient probative evidence to support his indictment is dispositive of any claim that the postal inspectors lacked a good faith basis for their advice to Marshall.

examiner acknowledged the fact that when the Postal Service has evidence of criminal misconduct, an employee may be fired immediately (30). The fact that Marshall had placed himself in a position where he had to choose between resignation and removal does not render his choice between those alternatives involuntary. As the Court of Claims noted in *Christie* (518 F.2d at 587-8):

Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation. *Federal Personnel Manual Supp. 752-1, Subchapter S1-2a (3)*.

Finally, it cannot reasonably be said that the circumstances surrounding Marshall's resignation were the product of coercion by the Postal Service. The only actions taken by the postal inspectors were those necessary to initiate the prosecution of Marshall for mail theft. Marshall was arrested, advised of his rights, questioned, arraigned and released on bond. All of those actions are standard procedure in the processing of a criminal suspect, and none of them can even remotely be said to have been intended to intimidate or coerce Marshall into resigning. As Inspector Duquette testified, the postal inspectors are "principally concerned with the criminal aspect and not the postal employee's job" (65).

Appellant in his Brief refers to the fact that there currently exists a Memorandum of Understanding between the Postal Service and the postal employees' union which prohibits postal inspectors from counseling employees with regard to resignations (12-13). The memorandum notes that the "understanding" was reached during the 1973 National negotiations, and the policies announced in the memorandum became operative for employees covered by the 1973 collective bargaining agree-

ment (12). The policies outlined in the memorandum were not in effect in 1972 when Marshall resigned (70). In fact, the Federal Personnel Manual Supplement at that time provided that:

It is proper for an agency to initiate a discussion with an employee in which he is given an election between leaving voluntarily . . . or having the agency initiate formal action against him. It is also proper for the agency in the course of the discussion to advise the employee which of the possible alternatives will be in his best interests. *Federal Personnel Manual Supp.* 752-1, S1-2(A).

The postal inspectors violated no regulations in responding to Marshall's questions about the effect of his arrest on his job.

Marshall may well have been nervous and apprehensive at the time of his arrest, and he may have believed that he was under some type of coercion, but duress and coercion are not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one. *Christie v. United States, supra*, 518 F.2d at 587. The involuntary nature of a resignation arises from external coercion, not from internal misconceptions. *McGuken v. United States, supra*, 407 F.2d at 1351; *Pitt v. United States*, 420 F.2d 1028 (Ct. Cl. 1970). Marshall has testified to no coercive acts by representatives of the Postal Service. The hearing examiner's finding that Marshall was not under duress at the time of his resignation had a rational basis in the evidence, and was properly affirmed.

2. The hearing examiner also rejected Marshall's claim that his resignation was tendered under undue time pressure. Marshall argues that because he resigned 5 or 6 hours after his arrest, it should be presumed that

he did so under time pressure. However, the fact that his resignation occurred soon after his arrest is irrelevant to the question of whether the Postal Service exerted time pressure upon him. The record contains no testimony supportive of such an allegation.

Appellant cites *Paroczay v. Hodges, supra*, to support his contention that his resignation was tendered under time pressure. In that case an employee of the Department of Commerce was told that if he did not resign "now", very serious charges would be filed against him, probably resulting in his removal. The court held that such time pressure raised an issue as to voluntariness, and remanded the case for a hearing on that issue. It is of critical importance to note that in *Paroczay* the employee was not advised of his rights and he was not afforded the time to consult with legal counsel. In addition, the employee attempted to withdraw his resignation seven days after he had tendered it. *Paroczay v. Hodges, supra*, 297 F.2d at 441.

In *Perlman v. United States, supra*, an employee was told that he was to be separated due to a reduction in force (RIF) by his employing agency. The employee immediately initiated a challenge to his separation before the Civil Service Commission. At approximately the same time, the employee was informed that he would receive a substantial annuity increase if he resigned before June 1, 1971. He tendered his resignation, effective May 31, 1971, and attempted to determine whether he could preserve his right to challenge the RIF action and win reinstatement after the effective date of the resignation. Despite repeated efforts on his part to obtain this information, government delay kept him from learning, until after the effective date of his resignation, that the resignation would bar him from pursuing his challenge to the RIF. The court noted that the govern-

ment's delay put the employee under a "desperate lack of time" which prevented him from rationally considering his options and making a reasoned choice. *Perlman v. United States*, *supra*, 490 F.2d at 933.

In the instant case, the Postal Service never promised to dismiss the charges against Marshall in exchange for his immediate resignation. Marshall consulted with his attorney about the desirability of his resigning on the date of his arrest, and they both agreed that resignation was the proper course to take. Neither Marshall or his attorney, Mr. Fish, requested additional time in which to make their decision on resignation, basically because time was not an important consideration. The Postal Service dictated no ultimatums or deadlines for Marshall, and he was under no pressure to make an immediate decision. In situations where employees were not forced to make choices on the spot, courts have consistently found that there existed no time pressure for resignation. *McGuken v. United States*, *supra*; *Rich v. Mitchell*, 273 F.2d 78 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 854 (1961).

Several weeks after his resignation, Marshall received a Postal Service Form 50, notifying him of the Service's acceptance of his voluntary resignation. Even after receiving this notification, which officially describes his separation as voluntary, Marshall did not attempt to withdraw his resignation or challenge its voluntariness. In fact, Marshall made no attempt to do so until, some 18 months after his resignation, the criminal charges against him were dropped. This uncontested evidence negates any inference that Marshall's resignation was generated by excessive time pressure. Obviously, as long as the criminal charges against him remained unresolved, Marshall was content not to challenge the voluntariness of his resignation.

3. The record is equally devoid of evidence supporting Marshall's contention that he was intimidated into resigning. He was at all relevant times represented by counsel, and his election to resign was based upon the advice of that counsel. It must again be noted that Marshall's subjective impressions are not the measuring stick on which intimidation or coercion is gauged. *Christie v. United States, supra*, 518 F.2d at 587; *McGuken v. United States, supra*, 407 F.2d at 1351. The test is an objective one, and Marshall has alleged no threats or acts of violence that could legally constitute intimidation. The acts of the postal inspectors were intended only to initiate Marshall's prosecution for mail theft, not to intimidate him to resign.

4. Marshall's final challenge to the voluntariness of his resignation is that he was deceived into resigning by postal inspectors who gave him erroneous information. According to Marshall and his attorney, Inspector Duquette advised them that Marshall would retain certain benefits if he resigned before he was separated by the Postmaster. Duquette denied these allegations, testifying that although he may have told Marshall that he would be "best off" by resigning, he never told Marshall or his attorney that employees lose any rights or benefits whatsoever by deciding not to resign (76).

The FEAA hearing examiner, who had the exclusive right to assess the reliability of witnesses, *Coscia v. Willard*, 257 F.2d 105, 107 (2d Cir.), *cert. denied*, 358 U.S. 885 (1958), credited Duquette's testimony and found the testimony by Marshall and his attorney to be vague and inconsistent (30, 31). She concluded in her decision that:

... the record fails to establish that the Postal Service deceived you by giving you erroneous information (30).

Even if Marshall received some erroneous impressions about his retirement benefits, in order for this factor to render his decision involuntary, he must prove that he relied upon the misrepresentation or deception in tendering his resignation. *Christie v. United States, supra*, 518 F.2d at 588. The record shows that Marshall resigned in the hope that the criminal proceeding against him would be dropped, not because he desired to preserve any retirement benefits.

Marshall testified at the hearing as to his understanding that, "it would be easier on me if I resign, more or less. That it may drop the case completely, if I resign and so forth" (29). That this understanding was the primary reason for Marshall's resignation is supported by the fact that during the 18 month period after his arrest, he never attempted to challenge the voluntariness of his resignation. It is extremely implausible that immediately after the charges against him were dropped, Marshall suddenly concluded that he had been deceived about his retirement benefits, and that his resignation was therefore involuntary. The only conclusion that can be reached under these facts is that reached by the Commission's Appeals Review Board, which found that Marshall's resignation "was based on his desire to avoid facing charges stemming from his alleged criminal acts" (33). Judge Neaher agreed, holding that:

Plaintiff hoped to discourage criminal proceedings in addition to avoiding charges filed by the Postmaster and the consequent risk of being fired (10).

A resignation based upon these factors is deemed voluntary. *Pitt v. United States, supra*; *Autera v. United States*, 389 F.2d 815 (Ct. Cl. 1968).

Judge Neaher held that the criteria used by the hearing officer in reaching her decision on the voluntariness of Marshall's resignation were neither improper nor arbitrary, and that her findings had a rational basis in the evidence adduced during the administrative hearings.

II.

Any Inference Drawn From Appellee's Decision Not To Produce Certain Witnesses At The Administrative Hearing Is Inconsequential.

In his Brief to this Court, Marshall argues that the appellee was under an obligation to call as witnesses the other two postal inspectors, besides Inspector Duquette, who were present during Marshall's arrest. The failure to produce these witnesses, Marshall argues, created an adverse inference that should have been drawn against the appellee.

In certain circumstances, the trier of fact in a civil litigation is permitted to draw an adverse inference from the failure of a party to produce a witness to testify. This inference arises only where one party has control over a witness who has exclusive knowledge of facts underlying the litigated issue. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

To justify the adverse inference, it must be apparent to the fact-finder that the testimony of the uncalled witness would not have been merely cumulative or corroborative of testimony already presented. *Kean v. C.I.R.*, 469 F.2d 1183 (9th Cir. 1972). No inference arises where other qualified witnesses have testified for a party concerning the same matters. *Georgia Southern & F. Ry. Co. v. Perry*, 326 F.2d 921 (5th Cir. 1964).

The existence of an adverse inference arising from the failure to call a witness depends entirely upon the facts of each individual case. Appellant relies upon *Interstate Circuit, Inc.*, *supra*, in which the Supreme Court held that "under the circumstances" of that case, a lower court was justified in concluding that testimony of certain employees would have been unfavorable to a corporate employer who refused to produce their testi-

mony. *Id.* at 226. The litigated issue was whether agents of the employer had acted pursuant to an illegal agreement for concerted action. The employer in that case failed to call "any officer or agent who knew, or was in a position to know" whether or not an agreement had been reached. *Id.* at 225. (emphasis added).

That case is clearly distinguishable from the instant situation. A resignation is presumed to be voluntary, and Marshall had the burden of proving the contrary. *Christie v. United States, supra*, 518 F.2d at 587; *Gratehouse v. United States, supra*, 512 F.2d at 1112. The Postal Service therefore did not have to present any evidence at all in order to prevail on the merits. The Service did call Postal Inspector Duquette, however, who was undoubtedly qualified to testify on the issue of voluntariness because he was with Marshall at all times relevant to his allegations of duress, time pressure, intimidation and deception. Although he stated several times that he could not recall "exactly what was said" (60, 62, 67), Duquette never stated that he did not remember the events surrounding Marshall's resignation. The fact that Duquette was unable to be more specific in his testimony was largely attributable to the fact that Marshall did not challenge the voluntariness of his resignation until eighteen months after the date of his arrest (65).

There is no reason to believe that the testimony of the other two postal inspectors would have been anything but cumulative and corroborative of the testimony presented by Duquette. If Marshall truly believed that the two inspectors would have supported his allegations, he could easily have contacted them and solicited their testimony. There is nothing in the record, however, to suggest that Marshall even attempted to contact the two inspectors for these purposes.

The hearing examiner held that the testimony offered by Marshall failed to prove any circumstances constitut-

ing duress, time pressure or intimidation, and that the testimony of Inspector Duquette was most credible on the issue of deception (29, 31). It was her sole responsibility as the finder of fact to assess the credibility of the witnesses. *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952). Her findings are in no way undermined by the failure of the Postal Service (or Marshall himself) to call additional witnesses.

The hearing examined took cognizance of the demand of Marshall's counsel that she apply an adverse inference against the Postal Service in making her findings of fact. If she elected to apply the inference and weigh the testimony in its light, her findings conclusively demonstrate that the inference was rebutted by the testimony of Inspector Duquette. If she elected not to utilize the presumption, that election was within her discretion because the inference is merely permissible. *First Wisconsin Bankshares Corp. v. Board of Governors*, 325 F.2d 946 (7th Cir. 1963). Regardless of which of the two courses the hearing examiner followed, her choice certainly cannot render her findings arbitrary and capricious.

III.

The Finding That Marshall's Resignation Was Voluntary Is Not Inconsistent With Commission Procedures, Policies or Precedents.

Appellant has correctly stated that federal agencies must apply their policies and precedents in a responsible, consistent manner. *Teamsters Local 814 v. NLRB*, 512 F.2d 564, 571 (D.C. Cir. 1975). Citing two administrative decisions in which the FEAA found an employee's resignation to have been involuntary, Marshall argues that this rule legally binds the Commission to follow these prior decisions and thus to find Marshall's resigna-

tion involuntary.³ This argument is completely without basis, either in law or in fact.

The question of whether a resignation is voluntary is one of fact. *McGuken v. United States*, *supra*, 407 F.2d at 1351. The hearing examiner found that Marshall had failed to meet his burden to prove, as a matter of fact, that he resigned under duress, time pressure, intimidation or deception. This decision does not in any way constitute a departure from agency rules, policies or precedents. See *Brennan v. Gilles & Cotting Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974). All relevant procedural requirements were complied with, and the test used in determining voluntariness was that contained in the Federal Personnel Manual.

Furthermore, the factual situations presented in the decisions on which Marshall relies—*J. Abbruzzese* (14) and *Robert F. Maier* (21)—differ from the one at bar in several crucial respects. In *Abbruzzese*, the employee was the victim of misrepresentation and deception by Postal Service employees. He resigned in reliance on the erroneous information that he would lose his retirement benefits if he didn't resign, and that his personnel records would contain no information about the reasons for his resignation (19). *Abbruzzese* did not consult with legal counsel prior to his resignation, and twenty-four hours after he was pressured into tendering it, *Abbruzzese* attempted to withdraw his resignation (16).

In the case of *Maier*, the FEAA found that the employee resigned in reliance upon erroneous information pertaining to his retirement benefits and the possibilities of his reinstatement (24). *Maier* did not have the opportunity to consult with legal counsel, and he filed his

³ Appellant has set forth these two administrative decisions in the Joint Appendix at pp. 14-26.

appeal on the voluntariness of his action 19 days after the date of his resignation (22).

In hearing these types of cases, the Commission is required to follow all relevant procedures and analyze the facts of each case in light of the applicable regulations, which provide that an employee's resignation is involuntary if it was tendered under duress, time pressure, intimidation or deception. If the decision rendered has a rational basis of the evidence, it must not be disturbed. *Wroblaski v. Hampton*, 528 F.2d 852 (7th Cir. 1976). Here, the proper standards were applied, and the administrative findings have a rational basis in the record.

CONCLUSION

The judgment dismissing the complaint against the appellee should be affirmed.

Dated: Brooklyn, New York
November 9, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
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*Of Counsel.**

*The United States Attorney's Office wishes to acknowledge the invaluable assistance of Patrick B. Northup in the preparation of this brief. Mr. Northup is a third year law student at the New York University School of Law.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of November 19 77 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
ROBERT DAVID BECKER, ESQ., 150 EAST 58th STREET, NEW YOR, NEW YORK
10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Sworn to before me this
14th day of November 19 77

[Signature]
Commission Expires March 30, 1979

